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716-745-64

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 650

JAMES B. BOREN, PETITIONER

v.

HONORABLE EDWARD C. MCLEAN, UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals denying an application for a writ of mandamus (R. 69; Pet. App. 28) is not reported.[1] The opinion of the district court (R. 56–58; Pet. App. 32–33) is not reported.

JURISDICTION

The order of the court of appeals was entered on October 31, 1963 (R. 69; Pet. App. 28). The petition for a writ of certiorari was filed on November 29,

[1] "R." refers to the certified record of the court of appeals. "Tr." refers to the transcript of hearing on the venue application in the district court, which we are lodging with the Clerk of this Court.

1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals properly denied a petition for mandamus to review the district court's refusal to transfer the trial of one of 15 defendants in a Securities Act prosecution.

STATEMENT

A thirteen-count indictment filed on May 2, 1963, in the United States District Court for the Southern District of New York charged petitioner and 14 others with having conspired from about September, 1957 to May, 1963 to violate the registration, anti-fraud and anti-manipulation provisions of the Securities Act of 1933, and with having committed certain substantive offenses pursuant to that conspiracy, in violation of 18 U.S.C. 371 and Sections 5 and 17 of the Securities Act of 1933, 15 U.S.C. 77e and 77q (R. 18–31).[2] The offenses related to the sale and delivery of common stock of the Mono-Kearsage Mining Company, a Utah corporation with offices in Salt Lake City, Utah, and Wichita Falls, Texas. The indictment named eight "principal defendants" and seven "salesmen defendants" (R. 61–62). Petitioner, who was a "principal defendant," was charged in the conspiracy and ten substantive counts.

[2] Count 1 charged the conspiracy; counts 2 through 9 charged use of the mails and interstate transportation and communication facilities for the purpose of sale and delivery after sale of unregistered stock; counts 10 through 13 charged use of the mails and interstate transportation and communication facilities in order to defraud or deceive purchasers of securities.

The indictment generally alleged that, without having the stock registered with the Securities and Exchange Commission, petitioner and others offered and sold more than 800,000 shares of the common stock of Mono-Kearsage by means of an intensive local and long-distance telephone and mail sales campaign in which numerous false representations were made. It also alleged that trading was stimulated on the Salt Lake City Stock Exchange so as to give the impression that there was a market for the stock.

In July 1963, petitioner filed a motion under Rule 21(b) of the Federal Rules of Criminal Procedure to transfer the proceeding against him from the Southern District of New York to the Northern District of Texas. He alleged, *inter alia*, that the proposed transferee district had jurisdiction over the alleged offenses; that he was born in Texas and had resided and worked for a number of years in Wichita Falls, Texas, although he was presently working in Oklahoma; that he had never resided in the Southern District of New York; that most of the business operations of Mono-Kearsage had been transacted in Texas; that he expected to call about 28 character and other witnesses, most of whom resided in Texas; and that he would be financially unable to bear the burden of a protracted criminal trial in the Southern District of New York (R. 32–42).

During argument on the motion, government counsel conceded that certain acts in furtherance of the scheme did take place in the Northern District of Texas, but pointed out that the "gist of the crime charged" took place in New York (Tr. 5–6). He

stated that the petitioner physically delivered the stock in New York; that it was transferred to two "boiler rooms" in New York from which it was sold throughout the country; that petitioner was physically present in New York on more than one occasion; that the sales activities all emanated from New York; and that all the principals other than petitioner resided in either New York or New Jersey (Tr. 5–8).

The district court denied petitioner's motion on the grounds (1) that a separate trial against petitioner would "involve considerable duplication of expense and effort," and (2) that the indictment alleged that the scheme to defraud was formed and to a large extent carried out in the Southern District of New York, and that much more was alleged to have occurred in the Southern District of New York than in Texas (R. 57–58; Pet. App. 32–33). With the government's consent, the court ordered a severance as to the four salesmen defendants who were before the court (R. 54–55; Pet. App. 29–30), three others being fugitives at the time.

Petitioner then sought in the court of appeals a writ of mandamus or prohibition to compel a change of venue as to him. In an opposing affidavit, the Assistant United States Attorney stated, *inter alia*, that the government had been in error in conceding in the district court that the Northern District of Texas had jurisdiction over all the offenses charged in the indictment (R. 63). The government's affidavit pointed out that while some of the business of Mono-Kearsage was carried on in Wichita Falls,

Texas, and one unregistered security count charged a mailing to Amarillo, Texas, the "contacts in Wichita Falls, Texas, relate to the Corporate affairs of Mono-Kearsage and not to the crimes charged in the indictment which are centered in New York and to a lesser degree in Salt Lake City, Utah." Hence it concluded that the Northern District of Texas would have jurisdiction only over counts 1, 6, 10 and 13. On October 31, 1963, the court of appeals, after argument, denied the application without opinion (R. 69; Pet. App. 28).

ARGUMENT

There is no occasion for this Court to review the court of appeals' refusal to issue the extraordinary writ of mandamus, whereby petitioner sought to have that court reverse the exercise of discretion by the district court in denying petitioner's motion for a change of venue. The opinion of the district court demonstrates that it carefully considered all the relevant factors. It then decided that, on balance, the interests of justice favored a trial in the Southern District of New York where the offense was principally committed, rather than in the Northern District of Texas, where some corporate affairs were transacted, and where petitioner's witnesses resided. This reasonable exercise of discretion is not a proper subject for mandamus. *Parr* v. *United States*, 351 U.S. 513, 520; *Ratke* v. *Picard*, 283 F. 2d 945 (C.A. 6), certiorari denied, 364 U.S. 927.

1. Assuming that the extraordinary writ of mandamus may occasionally be used to review the denial of a motion to transfer under Rule 21(b), *e.g.*, *Minnesota*

Mining and Manufacturing Co. v. *Platt*, 314 F. 2d 369 (C.A. 7), certiorari granted, 374 U.S. 825, No. 113, this Term, it should certainly not be available as a means of interlocutory review in the ordinary situation when a district court has exercised its discretion within permissible jurisdictional limitations. In the *Minnesota Mining* case, the court of appeals granted relief on a petition for mandamus since the district court, in denying the motion to transfer, had relied upon an "improper factor"—*i.e.*, the likelihood of obtaining a fair and impartial jury in the transferee district. In the absence of such unusual circumstances, mandamus is surely an inappropriate means of review. See *Aday* v. *United States District Court*, 318 F. 2d 588 (C.A. 6), certiorari denied, 375 U.S. 832, No. 355, this Term.

2. In the present case, the district court's exercise of discretion was eminently proper. While recognizing that a trial in Texas would be more convenient and less expensive for petitioner, the court also observed that, according to the government's representation, the alleged offenses were committed primarily in New York. The charges in the indictment did not involve the business affairs of the corporation, which may well have been transacted entirely in Texas and Utah; they concerned the unlawful and fraudulent sales of its stock, which occurred largely in New York. Since the sale was conducted on a nationwide scale from "boiler rooms" located in New York, and since the scheme was allegedly formed in New York, it was "in the interest of justice" to try *all* the conspirators in that district. *Aronson* v. *United States*, 319 F. 2d 48 (C.A. 2), certiorari denied November 18, 1963, No. 422, this Term.

Petitioner's contention that the decision in this case conflicts with *United States* v. *Johnson*, 323 U.S. 273, is frivolous. As this Court noted, the *Johnson* case concerned "the construction of the Federal Denture Act," 323 U.S. at 273, and turned on whether Congress intended to fix venue for criminal prosecutions under that statute in any district where an illegal denture was carried. It patently did not establish the principle, urged by petitioner, that a defendant in a criminal case is entitled to be tried in the district of his residence no matter where his alleged offense has been committed.

3. The district court also denied petitioner's motion because it would result in a "considerable duplication of expense and effort" on the part of the government. This was a permissible and relevant factor to consider in determining whether it would serve "the interest of justice" to grant the relief requested. Petitioner contends that this consideration was "eliminated" because the government consented to a severance of the "salesmen defendants," thereby requiring two separate trials in any event (Pet. 20). The government's agreement to this severance, however, was the product of its experience with similar trials wherein proof of the participation of the principals has differed considerably from the proof relating to the salesmen.[3] Accordingly, the Assistant United States Attorney advised the court that "the government has found in the

[3] See *Aronson* v. *United States*, No. 422, this Term; *Ross* v. *United States*, No. 327, this Term; and *Gordon* v. *United States*, No. 431, this Term, for a situation in which this procedure was followed in similar circumstances.

past that if it severs the salesmen and tries them separately it can dispose of the case in a much more expeditious manner" (Tr. 9).

The same considerations obviously do not apply to a severance of a "principal defendant" such as petitioner. If petitioner's trial were held separately in Texas, substantially the same evidence introduced in New York would have to be presented anew in Texas. Moreover, if petitioner's motion were granted, the result would be three trials arising out of the single conspiracy rather than the two which will now be held.

4. Finally, although this point was not called to the attention of the district court,[4] that court may have been without power to transfer seven of the eleven counts against petitioner. Counts 2–5 and 7–9 charged mailings of unregistered securities from the Southern District of New York to addresses in various states in New England, Maryland and Kentucky. Since the mailings did not move "from, through, or into" the Northern District of Texas, there may have been no jurisdiction in that district over the counts in question. 18 U.S.C. 3237. *United States* v. *Choate*, 276 F. 2d 724, 728–729 (C.A. 5). Transferring the cause to the Northern District of Texas for trial on the four counts over which that court unquestionably has jurisdiction and trying the petitioner on the remaining counts in the Southern District of New York (which may have been the only permissible

[4] While the government did indicate in the district court that it believed that venue would be in the Northern District of Texas, this concession was correctly limited on appeal to the counts which charged a conspiracy, schemes to defraud, and to the one count which charged a mailing to Texas.

method of granting petitioner's request) would burden petitioner as well as the government by requiring petitioner to defend at two trials. The petition for a writ of mandamus was, therefore, properly denied.

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

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